

SOAH DOCKET NO. 582-08-1023
TCEQ DOCKET NO. 2007-1867-UCR

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2009 DEC 28 PM 3: 04

APPLICATION FOR A WATER	§	BEFORE THE STATE OFFICE
RATE/TARIFF CHANGE OF TEXAS	§	CHIEF CLERKS OFFICE
LANDING UTILITIES,	§	
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY NO. 11997 IN POLK	§	
AND MONTGOMERY COUNTIES,	§	OF
APPLICATION NO. 35838-R, AND FOR	§	
A SEWER/RATE TARIFF CHANGE,	§	
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY NO. 20569 IN POLK	§	
COUNTY, APPLICATION NO. 35840-R	§	ADMINISTRATIVE HEARINGS

TEXAS LANDING UTILITIES' REPLY TO EXCEPTIONS TO THE
PROPOSAL FOR DECISION AND PROPOSED ORDER

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Applicant Texas Landing Utilities ("TLU"), water Certificate of Convenience and Necessity (CCN) No. 11997 and sewer CCN No. 20569, respectfully submits TLU's Reply to Exceptions to the Administrative Law Judge's ("ALJ's") Proposal for Decision ("PFD") and Proposed Order filed by the Texas Landing Property Owners' Association ("TLPOA"), TCEQ Office of Public Interest Counsel ("OPIC"), and TCEQ Executive Director ("ED") in the matter of Application Nos. 35838-R and 35840-R (the "Applications"). In support thereof, TLU incorporates its Closing Arguments, Reply to Closing Arguments, and Exceptions to the ALJ's PFD and proposed Order all previously filed in this case. Additionally, TLU would show the following:

I. REPLY TO TLPOA EXCEPTIONS

TLPOA excepts to Findings of Fact ("FOFs") 23-25, 43, 45-47, 54-57 and Conclusions of Law ("COLs") 2, 6, 8-10, and 16-18. These FOFs and COLs relate to the ALJ's PFD discussions on the topics of TEX. WATER CODE § 13.145 substantial similarity of TLU's water systems, rate of return ("ROR"), rate case expenses, and the propriety of TLU's application filing. No exception presented by TLPOA warrants modification to the PFD or proposed Order FOFs and COLs.

A. Substantial Similarity FOFs and COLs Should be Affirmed

At the outset, TLU notes that uncontroverted evidence shows that TLU only has one sewer system. PFD, at 3; FOF 19. Therefore, substantial similarity is not an issue for the purpose of TLU's sewer tariff, although TLPOA still contests that point. TLPOA Exceptions, at 7. However, TLU does have two physically separate water systems that it operates together. TLPOA continues to dispute the substantial similarity of those systems within the meaning of TEX. WATER CODE § 13.145. The Commission should adhere to the ALJ's PFD recommendations on this issue and her corresponding FOFs and COLs.

TLPOA's suggestion that the Commission should adopt an analysis of TLU's Applications based on the recently announced post-hearing Commission decision in *Application of Double Diamond Utilities, Inc.* ("Double Diamond")¹, referenced in the ALJ's PFD, ignores the fact that the standard for substantial similarity announced in the *Aqua Texas* decision applied by the ALJ in her PFD was relied upon for the duration of the TLU Applications hearing. PFD, at 6-9; *see also* TLU-42 (Application by Aqua Utilities, Inc. and Aqua Development, Inc. d/b/a Aqua Texas, Inc., SOAH Docket Nos. 582-05-2770 and 582-05-2771); TLU-43 (TCEQ Order Approving Aqua Utilities, Inc. and Aqua Development, Inc. d/b/a Aqua Texas, Inc.'s Water and Sewer Rates, Issued 9/23/08) ("*Aqua Texas*"). As noted by the ALJ, the *Aqua Texas* approach was supported by the ED in the TLU Applications hearing. *Id.* Moreover, unlike in *Double Diamond* where it appears very little or no effort was made by the applicant to present TEX. WATER CODE § 13.145 evidence, TLU presented evidence in this case specifically addressing TEX. WATER CODE § 13.145 issues in line with the *Aqua Texas* decision because TLPOA challenged the consolidation issue here without regard for the factual and legal conclusions announced in that decision.²

¹ *In re Application of Double Diamond Utilities, Inc. to Change its Water Rates and Tariff in Hill, Palo Pinto, and Johnson Counties, Texas*, Application No. 35771-R, SOAH Docket No. 582-08-0698, TCEQ Docket No. 2007-1708-UCR.

² There were apparently multiple evidentiary failures found across the board with respect to the application filed in *Double Diamond*. Those failures are not present in this case.

TLU respectfully submits that the *Aqua Texas* decision actually sets forth the correct approach to TEX. WATER CODE § 13.145 when compared with *Double Diamond*. Neither the *Double Diamond* PFD nor Commission Final Order discuss the need to harmonize TEX. WATER CODE § 13.145 with the strong legislative preference for regionalization expressed in Chapter 13 of the Texas Water Code in the form of a mandate to the Commission to develop policies promoting the consolidation of systems under regional tariffs. See, e.g., TEX. WATER CODE §§ 13.182(d), 13.183(c), and 13.241(d). In contrast, the *Aqua Texas* PFD provided an extensive analysis of that issue. TLU-42 (*Aqua Texas* PFD), at 24-27; TLU-43, *Aqua Texas* Commission Final Order, at 9-11, 18. Hence the rejection, for example, of the “snap shot” approach advocated by TLPOA here. *Aqua Texas*, PFD, at 24-27, 38; see also PFD, at 8-9. It is not clear why that analysis was not performed in *Double Diamond*.

Significantly, the ALJ in TLU’s case found there was little dispute about aspects of TEX. WATER CODE § 13.145 unrelated to cost of service. PFD, at 5. However, with respect to the cost of service issue, the Commission should adopt the ALJ’s approach to TEX. WATER CODE § 13.145, at least in this particular case if not others, applying *Aqua Texas*.

1. FOF 23

TLPOA excepts to FOF 23 because of differences in TLU’s two water systems while conceding that there are similarities. TLPOA Exceptions, at 2. The evidence considered by the ALJ in support of FOF 23 demonstrates that TLU’s water systems are substantially similar even if not identical. PFD, at 5. TLU reiterates that it met its burden to show substantial similarity in cost of service using the *Aqua Texas* standard; using that standard, the “subsidiz[ation]” alleged by TLPOA works both ways and balances out over time. PFD, at 8-9. The Commission should affirm FOF 23.

2. FOF 24

TLPOA excepts to FOF 24 because the TLU wells require blending to meet required arsenic limits. However, FOF 24 relates to the quality of water distributed to customers, not the quality of

raw water before treatment. PFD, at 5. The Commission should affirm FOF 24.

3. FOF 25

TLPOA excepts to FOF 25 regarding substantial similarity in cost of service between TLU's water systems based primarily on the *Double Diamond* decision, which should not be applied here. However, TLPOA also suggests that the testimony by Mr. David Veinotte should have allowed the ALJ to find against substantial similarity in cost of service for TLU's water systems. The ALJ's decision is sound because TLPOA's approach was flawed for multiple reasons besides not being in line with *Aqua Texas*.

TLPOA's suggested analysis misses the mark in numerous ways. First, as the ED and TLU pointed out, no separate cost of service study for each TLU system was mandated by rule for TLU's Applications. PFD, at 6, 9. Second, TLPOA's purported expert was not qualified to render an opinion about how to calculate cost of service for TCEQ-regulated investor-owned utilities. TLPOA-1 at 1:2 - 3:14 (Veinotte Prefiled); Tr. at 258:5 - 267:16, 304:4-11, and 310:17 - 317:18 (David Veinotte, May 22, 2009). Third, as discussed in TLU's Closing Arguments, TLPOA's approach was flawed because it:

- made no attempt to follow the Texas Water Code or the TCEQ rules [TLPOA - 1 at 51:17 - 54:12 (Veinotte Prefiled); TLPOA - 15 (Texas Landing Utilities Recommended Water Rates by Service Area); TLPOA-16 (Texas Landing Utilities Recommended Sewer Rates by Service Area); and TLPOA-17 (Texas Landing Utilities Recommended Water Rates by Service Area (Surcharge Refund Included in Joint Assets))];
- cherry picked numbers from various places to suit his purpose and make his end result come out like he wants - *i.e.*, lower rates for Texas Landing Subdivision customers and no other TLU customers [Tr. at 502:14-505:9, 508:23 - 512:22 (Marvin Morgan, May 22, 2009)].
- disregarded important aspects of rate-setting concepts that TCEQ rules require be considered such as original cost, straight line depreciation, proper treatment of customer contributions, the benefits of regionalized/consolidated systems and many other aspects of both Mr. Morgan's and TCEQ's staff's recommendations [*Id.*];
- initially proposed to use a 40% consumer price index increase as a measure of TLU's cost of service, a method which similarly did not comply with TCEQ rules or consider TLU's true cost of service [Tr. at 273:22 - 274:23 (David Veinotte, May 22,

2009). TLPOA does not even consider a volumetric charge in its rates. TLPOA-1 at 51:17 - 54:12 (Veinotte Prefiled); TLPOA - 15 (Texas Landing Utilities Recommended Water Rates by Service Area); TLPOA-16 (Texas Landing Utilities Recommended Sewer Rates by Service Area); and TLPOA-17 (Texas Landing Utilities Recommended Water Rates by Service Area (Surcharge Refund Included in Joint Assets))); and

- proposed rates that are discriminatory and in clear violation of the Texas Water Code because they ascribe different rates to customers within the same class [TEX. WATER CODE § 13.182].

As the ALJ points out, TLPOA's approach disregarded the fact that the Texas Landing Subdivision connections and the Mangum Estates/Bull Frog Basin Subdivisions' connections are physically served by the same water and sewer systems. PFD, at 8. Also, the statement that TLU did not controvert TLPOA's calculated cost per month per connection is false. TLPOA Exceptions, at 4. Those calculations collapse under the weight of the evidence discussed above that they were performed improperly.

There were good reasons for the ALJ to reject TLPOA's approach to cost of service and substantial similarity of same in this case. PFD, at 6-9. TLU met its burden of proof using the *Aqua Texas* standard. The Commission should affirm FOF 25.

4. COLs 6, 8, 9, and 10

TLPOA excepts to COLs 6, 8, 9, and 10 for essentially the same reasons it excepts to FOFs 23, 24, and 25. For all the reasons discussed above related to those FOFs, TLPOA's exceptions to COLs 6, 8, 9, and 10 should similarly be rejected in accordance with the PFD. The Commission should affirm COLs 6, 8, 9, and 10.

B. Rate of Return Issues

1. FOF 43 Should be Affirmed if ROR Worksheet Used

TLPOA's exception to FOF 43 is also in error. While TLU objects to the entire concept of using the ROR Worksheet to calculate ROR on equity and overall ROR in this case, Step G is an area where the ALJ correctly determined that TLU is entitled to a percentage point if the ROR Worksheet is used. PFD, at 20-21. As discussed, Step G requires finding that four out of five

criteria are met. PFD, at 20. The evidence shows that at least four criteria were met, and possibly all five.

TLPOA's contends that TLU does not have "well-maintained, up-to-date books and records". *Id.* This calls for a somewhat subjective analysis, further demonstrating why the ROR Worksheet is a problem. However, the ED's testifying expert witness, Sheresia Perryman, found TLU's general ledgers and invoice documentation to be well-maintained and up-to-date, and she was able to complete her desk audit of those records during her review of TLU's Applications. ED-1 at 2:13-21 (Perryman Prefiled); Tr. at 372:13-19, 383:19 - 384:3 (Sheresia Perryman, May 22, 2009); ED-SP-9 (Revised Staff's Calculation of Rate of Return). The ALJ correctly accepted this evidence in giving TLU credit for Step G. PFD, at 20. Contrary to TLPOA's accusation, Mr. Morgan did not "correct and/or create the books in preparation for the rate application". TLPOA Exceptions, at 4. Ms. Comstock used TLU's books and records to complete the Applications initially. Tr. at 475:13-19 (Kimberly Comstock, May 22, 2009); TLU-46 (Rate of Return Worksheet with Handwritten Changes). TLU's testifying expert, Marvin Morgan, analyzed the books as he found them and based any adjustments to the Applications on TLU records as they existed. Tr. at 144:7-9, 163:15-25 (Marvin Morgan, May 21, 2009). Mr. Morgan did not alter the books. Only one adjustment was made to the books by Ms. Comstock with respect to certain Goode City assets shortly before the hearing. Tr. at 104:8 - 106:12 (Kimberly Comstock, May 21, 2009); TLU-34 (Evergeeen Country, LLC Transaction Journal). That single adjustment does not mean TLU's books and records are not generally "well-maintained" and "up-to-date" as determined by the ED and ALJ. PFD, at 20; FOF 43. The evidence does not support TLPOA's exception to FOF 43 related to TLU's books and records.

The ALJ also correctly analyzed other Step G issues. The ALJ properly determined that TLU has effective communications and good customer relations aside from disagreements stemming from the Applications. PFD, at 21. The issue of whether TLU consistently meets its reporting

requirements and payment of fees is not contested. Tr. at 372:13-19 (Sheresia Perryman, May 22, 2009); Tr. at 487:11-16 (Karen Mann, May 22, 2009); ED-SP-9 (Revised Staff's Calculation of Rate of Return); TLU- 46 (Rate of Return Worksheet with Handwritten Changes); *see also* TLPOA Exceptions, at 4. The evidence also shows TLU reasonably held off on filing for a rate increase primarily because it wanted to grow its customer base first so that the costs on a per customer basis were lower, and TLU disagrees with TLPOA's contention that TLU should have filed for a rate increase sooner. Tr. at 475:20-25 (Kimberly Comstock, May 22, 2009).

Finally, TLU concurs with the ALJ's recommendation with respect to the fifth Step G criteria regarding water line loss, but only if the Commission decides that this step is a proper measure to use for rate of return and that test year information is the relevant set of information to analyze, as recommended by the ALJ. PFD, at 20. During the hearing, TLU's expert, Marvin Morgan testified that the 12% standard acts as a penalty that conflicts with his opinion that utilities should not be penalized for not chasing water leaks when unaccounted for water loss is at 15% or below. Tr. at 209:19 - 213:2 (Marvin Morgan, May 22, 2009). Another problem is that the ROR Worksheet does not clearly state which year to use for the purpose of "G.5". ED-SP-9 (Revised Staff's Calculation of Rate of Return); TLU-46 (Rate of Return Worksheet with Handwritten Changes). Regardless, TLU should get a percentage point here as recommended by the ALJ based on the other four criteria. PFD, at 20-21.

For all these reasons, TLPOA's exceptions to FOF 43 related to Step G of the ROR Worksheet are unsupported by the record evidence. The Commission should affirm FOF 43 if the ROR Worksheet is used.

2. FOF 45-47 - Total Rate of Return

TLPOA excepts to FOF 45-47 because it contends that TLU is only entitled to a ROR of 8.48%. For reasons discussed in prior TLU briefing, TLU contends that either a 12% ROR is appropriate or a 14.46% ROR if the ROR Worksheet is used. Therefore, TLU also excepts to FOF

45-47, but for different reasons.

Regardless of TLU's exceptions, the Commission should reject TLPOA's proposed 8.48% ROR because it is not supported by the evidence. As reflected by the evidence discussed in the PFD, there are multiple ROR Worksheet steps that must be seriously considered if the ROR Worksheet is used. At a minimum, an additional percentage point based on Step G is warranted (the ED initially recommended a second additional percentage point for a total of 10.48% based on Step C that was later retracted). PFD, at 20-22. In contrast, TLPOA's witness David Veinotte chose to cut TLU off from any further ROR Worksheet credit beyond Steps "A" and "B". TLPOA-11 (Rate of Return Worksheet); Tr. at 282:11 - 283:22 (David Veinotte, May 22, 2009). Mr. Veinotte claims he analyzed the remaining steps based on his "general knowledge" about TLU, but did not seek out any documents or records that were not in the application or discovery material to complete analysis of the remaining steps. *Id.* As reflected by the ALJ's PFD discussion of all ROR Worksheet steps, if the ROR Worksheet is used, TLPOA's approach is untenable.

C. Rate Case Expense FOFs and COLs Should be Affirmed

1. FOF 54-57

TLPOA excepts to FOF 54-57 related to rate case expenses. TLPOA purports to complain that TLU's rate case expenses are not in the public interest, but TLPOA is really complaining about their reasonableness and necessity. If the expenses were reasonable and necessary, as the ALJ determined, it is in the public interest for TLU to recover them. The hearing was held at TLPOA's request, was supposedly for the public interest, and necessitated TLU's participation. If TLU's rate case expenses were reasonable and necessary, as the ED and ALJ determined, TLU should be allowed to recover those expenses in this administrative proceeding because, as a private regulated utility, that is its only means of doing so. If TLU is not allowed to recover those expenses, despite their reasonableness and necessity, TLU's financial integrity will be adversely impacted in contravention of TEXAS WATER CODE § 13.183(a)(2) and such circumstances would constitute an

unconstitutional confiscatory taking of private property against the public interest. Moreover, deterioration in customer service could result, which would not serve the public interest. Consequently, the “reasonable and necessary” findings go hand in hand with an implied finding that recovery of those expenses is in the “public interest”. 30 TEX. ADMIN. CODE § 291.28(7).

TLPOA contends it has no burden to prove specific amounts are unreasonable. TLPOA Exceptions, at 5. TLU respectfully disagrees. To the extent TLPOA contends that certain TLU rate case expenses are unreasonable, TLPOA has a burden to prove that contention. Instead, TLPOA took the position throughout the hearing that TLU should not recover any rate case expenses at all in this case. TLPOA-1 at 49:6 - 50:13 (Veinotte Prefiled). Their position was that TLU is entitled to no rate case expenses because “[t]his whole mess was created by Mr. Sheffield.” *Id.* TLPOA-1 at 49:6 - 50:13 (Veinotte Prefiled). As correctly recognized by the ALJ, TLPOA presented no controverting evidence on rate case expenses and neither did the ED. PFD, at 30-31.

TLPOA misrepresents that it had only “last-minute evidence” to work with because Mr. Morgan and Mr. Terrill both offered testimony and exhibits reflecting the amounts they billed TLU for their respective work on this case and the reasonableness and necessity of those TLU expenses. TLU-D at 38:14 - 41:6 (Morgan Prefiled); TLU-E at 4:17 - 9:10 (Terrill Prefiled); TLU-20 (TLU Rate Case Expenses as of 10/10/2008); TLU-20A (Marvin Morgan’s Invoices); TLU-20B (The Terrill Firm’s Invoices).³

TLU does not wish to rehash old discovery disputes at this late stage in this proceeding, but is obliged to point out that TLPOA incorrectly asserts it was “forced” to bring its Motion to Compel against TLU. TLPOA Exceptions, at 5. TLU used a different acceptable method to support its rate case expenses in pre-filed testimony and TLPOA did not request the unredacted invoices it sought in its Motion to Compel (“MTC”) previously during discovery.

³ In accordance with the ALJ’s direction, these expense totals will necessarily be supplemented by affidavit post-PFD and post-exceptions. Tr. at 254:5 - 255:8 (May 22, 2009); PFD, at 30; *see also* Tr. at 138 (Marvin Morgan, May 21, 2009); Tr. at 231-233 (Paul Terrill, May 21, 2009).

Regardless, invoices for Mr. Morgan and Mr. Terrill's work, produced at the ALJ's direction with an opportunity to redact entries as appropriate, were offered into evidence and TLPOA had ample opportunity to challenge them. TLPOA-28 (Marvin B. Morgan Invoices); TLPOA-29 (The Terrill Firm Invoices). But the Third Court of Appeals in Austin recently determined unredacted fee bills are not necessary to support attorneys' fee amounts and that affidavits can be used that include sworn statements setting out the attorneys who performed the work, the number of hours billed by each, their hourly rates, a description of the tasks for which legal service were performed, the qualifications and experience of the affiant, and a statement about the customary nature of the fees charged. *Save Our Springs Alliance, Inc. v. City of Dripping Springs, et al.*, No. 03-04-00683-CV, 2009 WL 1896070, at *16 (Tex. App.— Austin, July 3, 2009) (not yet released for publication) Opinion in *Save Our Springs Alliance, Inc. v. City of Dripping Springs; Todd Purcell; and Mak Foster Ranch, L.P.*; Cause No. 03-04-00683-CV at 33-34. Moreover, rates for Mr. Terrill's law firm attorneys, which happened to be the attorneys in question representing one of the Defendants in that case, were approved as reasonable in that decision. *Id.* Mr. Terrill's testimony and exhibits took care of all those issues in this case. Nevertheless, the invoices themselves are in the record for consideration and TLPOA's exception should not be grounds for modifying the ALJ's rate case expense findings.

TLPOA also accuses Mr. Morgan of spending unnecessary time re-working TLU's books. TLPOA Closing Arguments, at 2-3, 12. That is simply false. Even though Mr. Morgan developed recommended adjustments to TLU's Applications during his review, he reviewed the books as presented to him by TLU without adjusting them. Tr. at 144:7-9, 163:15 - 25 (Marvin Morgan, May 21, 2009); TLU-D at 6:13 - 7:4 (Morgan Prefiled); TLU-24 (Corrected Application Schedules); TLU-25 (Depreciation Schedule - Water); TLU-26 (Depreciation Schedule - Sewer). Ms. Comstock made one simple bookkeeping adjustment regarding TLU's Goode City subdivision water system assets after conferring with Mr. Morgan about it, but the correction was for an entry she meant to

make in 2005 well before ever discussing it with Mr. Morgan. Tr. at 104:8 - 106:12 (Kimberly Comstock, May 21, 2009); TLU-34 (Evergreen Country, LLC Transaction Journal). Mr. Morgan's time was not spent re-working TLU's books.

TLPOA also complains about the amount of TLU's rate case expenses in comparison to TLU's annual revenue increase sought. First, this disregards the fact that the new funds sought by TLU continue from year to year until TLU's next rate case dating back to the effective date of TLU's proposed rates on November 26, 2007. TLU-32 (Notice of Proposed Rate Change). In other words, the "amount in controversy" is much broader than any single year because it recurs for many years. The ALJ recognizes this fact in her PFD. PFD, at 31. Second, this is an administrative proceeding (not a damage case) and many of the issues raised by TLPOA relate to establishment of certain rights (e.g. regionalization of rates) as opposed to the amount of TLU's proposed rate increase. "Type of controversy" is another consideration that should factor into the reasonableness of rate case expenses, not just "amount in controversy" as TLPOA contends. *Save Our Springs Alliance, Inc. v. City of Dripping Springs, et al.*, No. 03-04-00683-CV, 2009 WL 1896070, at *16 (Tex. App.—Austin, July 3, 2009) (not yet released for publication). As the *Aqua Texas* case demonstrated, more than \$2.75 million in rate case expenses was approved by the ALJs and the Commission, even though the "most significant issue" in the rate case was rate regionalization, the same issue TLPOA so vehemently opposes. TLU-42 at 13 (Application by Aqua Utilities, Inc. and Aqua Development, Inc. d/b/a Aqua Texas, Inc., SOAH Docket No. 582-05-2770 and 582-05-2771).

TLU's uncontroverted rate case expense testimony should be taken as true and TLU should be allowed to recover its rate case expenses as testified by Mr. Morgan and Mr. Terrill. TLU should be allowed to recover the entirety of its rate case expenses not because they are reasonable "per se," but because the preponderance of the evidence clearly shows their reasonableness. 30 TEX. ADMIN. CODE §§ 80.17(a) and 291.12. The ALJ's PFD affirms this conclusion and that TLU has met its burden of proof regarding the rate case expenses it seeks to recover. PFD, at 31. The Commission

should affirm FOFs 54-57.

2. COLs 16-18

TLPOA excepts to COLs 16-18 for essentially the same reasons it excepts to FOFs 54-57. For all the reasons discussed above related to those FOFs, TLPOA's exceptions to COLs 6, 8, 9, and 10 should similarly be rejected in accordance with the PFD. The Commission should affirm COLs 6, 8, 9, and 10.

D. COL 2 Regarding Application Filing Should be Affirmed

TLPOA excepts to COL 2 that it was proper for either David L. Sheffield or Texas Landing Utilities, L.L.C. to file the Applications for TLU. The ALJ correctly evaluated the evidence on this issue in her PFD. PFD, at 32. The Commission should affirm COL 2.

II. REPLY TO OPIC EXCEPTIONS

Unlike TLPOA, OPIC has focused the entirety of its exceptions on the TEX. WATER CODE § 13.145 substantial similarity issue, in part based on the *Double Diamond* decision. However, the Commission should reject OPIC's exceptions in favor of the ALJ's PFD analysis of this issue.

Regarding OPIC's cost of service analysis, TLU reiterates that the *Aqua Texas* standard should carry the day in lieu of the *Double Diamond* standard. Moreover, TLU met its burden of proof applying the *Aqua Texas* standard. TLU fails to see how depreciation is not a "real cost" as suggested by OPIC. OPIC Exceptions, at 7.

Regarding the remainder of OPIC's TEX. WATER CODE § 13.145 analysis, like TLPOA, OPIC elects to focus on dissimilarities as opposed to any of the evidence about similarities presented by TLU. Fortunately, the ALJ correctly weighed that evidence. The Commission should affirm ALJ's FOFs and COLs regarding TEX. WATER CODE § 13.145 to the extent applicable.

Contrary to OPIC's recommendation, it would in no event be appropriate for the Commission to throw out TLU's entire application and deny TLU's recovery of reasonable rate case expenses because of any perceived failure to prove entitlement to consolidation under TEX. WATER CODE §

13.145. OPIC Exceptions, at 1-2, 8. This is particularly true given that TLU litigated this case with the *Aqua Texas* decision in mind, not *Double Diamond* as OPIC suggests should be applied here. The result proposed by OPIC would be completely absurd and inequitable.

If the Commission determines that *Double Diamond* should apply here, and that TLU has not met its burden of proof under that standard, TLU respectfully suggests that a remand would be the appropriate result. However, significant time and resources have been spent by all involved in this case already, and TLU does not believe a remand is necessary for its Applications.

III. REPLY TO ED EXCEPTIONS

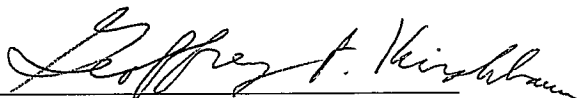
If the ED's proposed rates are adopted by the Commission, the ED's proposed corrections to FOFs 28 and 46 are also appropriate. However, TLU incorporates its prior exceptions to the ED rates, accepted by the ALJ, for various reasons.

IV. CONCLUSION AND PRAYER

After considering the foregoing, TLU respectfully requests that the Commission adopt the ALJ's PFD and issue the ALJ's proposed Order with the changes discussed in TLU's Exceptions. TLU respectfully requests approval of Application Nos. 35838-R and 35840-R and the rate/tariff changes requested by TLU in this proceeding.

Respectfully submitted,

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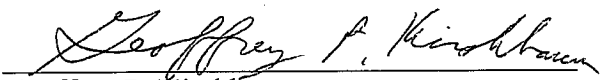
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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2009, a true and complete copy of the foregoing was sent to the following by facsimile, first-class mail or courier:

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